



OLC 74-0613

5 April 1974

MEMORANDUM FOR: The Director

SUBJECT: Agency Position--Amendments Freedom of Information Act

1. The Congress is actively considering legislation to overrule the Mink case. The legislation would authorize court review of the contents of records to determine if the withholding of records from the public is proper under one of the nine specific exemptions authorized in the Freedom of Information Act. Two of the nine exemptions involve matters:

- a. Specifically required by Executive order to be kept secret in the interest of national defense or foreign policy (the implementation of this exemption was at issue in the Mink case), and
- b. Specifically exempted from disclosure by statute.

2. A good case can be made over the distinction between information required to be kept secret by Executive order and information specifically exempted from disclosure by statute. Interestingly, the committee report on the House-passed bill supports this distinction, i.e., that the court review amendment is aimed at the exemption involving information classified under Executive order but that there is not to be any court review of information specifically exempted from disclosure by statute, and "Restricted Data" is cited as an example of the latter.

3. It can be argued that a number of categories of information are subject to explicit statutory direction concerning their proper handling, thereby eliminating administrative discretion as exists in the classification

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of information pursuant to an Executive order. Three such categories of information prohibited by statute are: "Restricted Data" (42 U.S.C. 2162), relating to atomic energy matters; Communication Intelligence (18 U.S.C. 798); and Intelligence Sources and Methods (50 U.S.C. 403(d)(3) and g).

4. The pending legislation as written authorizes the courts to review any and all information. This would include "Restricted Data," COMINT, and intelligence sources and methods. Consequently, some modification in the language is in order if, as the House report states, it is not the intent of the legislation to encourage or authorize court review of information specifically protected from disclosure by an Act of Congress. (See attachment for suggested language.)

5. We are attempting to line up support for this amendment with the National Security Agency and the Atomic Energy Commission. NSA concurs but we have not yet had a final word from AEC.

6. We have been encouraged by our preliminary soundings with the staffs of Senators Hruska, Scott, and Thurmond (ranking members of the Judiciary Committee and of the subcommittee dealing with this matter). We also plan to be in contact with the offices of Senators Eastland and McClellan, the Chairman and ranking majority member of the Committee, and with the offices of several members of our oversight committees.

7. Finally, as a fallback position the Office of General Counsel is in touch with Justice concerning an amendment affixing limits on the court review, e.g., limit it to a finding that the Executive determination was arbitrary or capricious. The Department of Justice is carrying the ball on this position within the Executive Branch and the Congress.

8. With your approval, we will continue our efforts on a low profile basis to gain acceptance of an amendment along the lines of the attachment.

[REDACTED] STATINTL

George L. Cary  
Legislative Counsel

Att.

STATINTL

CONCUR:

John S. Warner  
General Counsel

5 APR 1974  
Date

DCI Approval

6 APR 1974

STATINTL

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1 - [REDACTED]

1 - D/Security

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PROPOSED AMENDMENTS TO  
S. 2543 (Committee Print) underscored

I. Either:

"In such a case the court shall consider the case de novo, with, except for matters withheld under section 552(b)(3), involving, but not limited to, Restricted Data, intelligence sources and methods, and communication intelligence under sections 2162 of Title 42, 403(d)(3) and 403g of Title 50, 798 of Title 18 and 73 Stat. 64, such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action."

II. Or:

"In such a case the court shall consider the case de novo, with, except for matters withheld under section 552(b)(3), such in camera examination of the requested records as it finds appropriate to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action."

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Routing Slip

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10	LC	✓		20			

SUSPENSE

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Remarks:

Should we consider marking documents Intel ~~info~~ when they ~~do~~ do contain such ~~info~~  
This would not necessarily include disseus or finished intel ~~info~~

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4/6/74